provision of s 231(b), the accused is required by law to be retried before another jury.

The argument of the appellant that the learned trial judge had no alternative but to accept and concur with the majority verdict must accordingly fail. When the jury found the appellant guilty of the lesser offence by majority of five to two, there was at that juncture no verdict in law which the learned judge must accept. The fact that in his summing up to the jury, the trial judge had referred to their duty to consider a verdict of guilty of lesser offences other than murder, did not deprive him of the statutory option. In a murder trial, it is essential for the trial judge to direct the jury on the possibility of returning a verdict of guilty of a lesser offence where the evidence of the prosecution or defence so warrants - see *Ramlan bin Salleh* v *PP*.[8] The fact that he had properly directed the jury on offences lesser than murder as warranted by evidence adduced by the defence, cannot be used in argument as a basis for saying that he had exercised his option wrongly under s 231.

The duty of the trial judge under s 223 of the CPC, in summing up the evidence and laying down the law by which the jury are to be guided, has nothing to do with his duty and option under s 231 if the guilty verdict of the jury is not unanimous.

The appeal was accordingly dismissed, and since the alleged offence was committed some years ago, we also ordered that an early date be fixed for the retrial of the appellant.

Appeal dismissed.

Solicitors: *Ajmeer Singh Sandhu & Co.*

Reported by *Prof Ahmad Ibrahim*

Re Thow Seng Yeap; Thow Chow Goon & Anor v Khor Kar Chooi v Anor

SUPREME COURT (KUALA LUMPUR) - CIVIL APPEAL NO 258 OF 1988
MOHAMED AZMI, HARUN HASHIM AND AJAIB SINGH SCJJ
18 OCTOBER 1989

Family Law - Adoption of infant - Refusal of natural parents to give consent - Whether unreasonable - Adoption Act 1952, s 5(1)

In this case the appellants, the natural parents of an infant boy, had given the infant to the respondents for the purpose of adoption according to Chinese custom. The natural parents continued to see the infant from time to time when he was in the custody of the respondents. After two years, the natural parents changed their minds and asked for the return of the infant. The foster parents refused. The foster parents then applied to the High Court for an adoption order. The natural parents opposed the application and withheld consent. The learned judge allowed the application of the respondents, the foster parents. He relied on the de facto adoption of the infant and the fact that the infant had lived for nearly four and a half years with the foster parents. The appellants appealed.

Held, allowing the appeal:
In all the circumstances of this case, the natural parents' withholding of consent was not unreasonable. From the facts of the case, there were no grounds why the foster parents should be preferred to the natural parents from the point of view of the welfare of the infant. It would defeat the object of the legislature that all adoptions should be in accordance with the Act if the courts were to recognize de facto adoptions as a ground for dispensing with parental consent. The court was of the view that, in this case, the change of surroundings would not be disruptive as, after all, the infant is being taken back by his natural parents and is to be brought up together with his twin sister.

Cases referred to
1 *Re PR (An Infant)* (1971) 115 SJ 586 (refd)
2 *O'Connor* v *A and B* [1971] 1 WLR 1227 (distd)

Legislation referred to
Adoption Act 1952 s 5(1)

Teja Singh Penesar for the appellants.
Tan Beng Hong (*Lee Boon Ten* with him) for the respondents.

Cur Adv Vult

Harun Hashim SCJ (delivering the judgment of the court): On 20 July 1983 twins were born to a Chinese couple. The father (born in 1954) was a goldsmith and also worked as a construction labourer. The mother (born in 1957) was a housewife. The couple's first child is a girl who was born on 9 April 1982. One of the twins is a boy ('the infant') and the other a girl. The infant was born with two teeth. According to Chinese superstition, such a child would be difficult to bring up and so, soon after the birth, the infant was given in the care of the mother of a friend of the father.

As a construction labourer, the father worked for a building contractor (born in 1931) who lived with his wife

(born in 1944). They have six children of their own whose ages at the material time ranged from 23 years to 3 years; all of whom except for the eldest lived with their parents. The contractor agreed to adopt the infant. So, on 11 November 1983 an adoption ceremony was performed at the Temple of the Goddess of Mercy in Pitt Street, Penang, at which the natural parents of the infant were present. The infant was then less than four months old and lived with the foster parents from them on. The natural father played with the infant everyday as his workplace was where the infant lived but never took him away. The natural mother visited the infant once a month or once in three months.

These are the facts as found by the learned judge and we have no reason to disturb his findings. He concluded in his judgment, with which we agree, as follows:

> I am satisfied that when the boy was placed in their care it was for the express purpose of adoption - no doubt an adoption according to Chinese custom - but a de facto adoption nevertheless. It is highly improbable that Chinese parents who believe strongly in the preservation of the family name would give away their only son - a four-month old boy - unless there was some cogent reason for doing so.

After about two years of this arrangement, the natural parents, on 23 April 1986, changed their minds and asked for the return of the infant. The foster parents refused. Relations between them became strained and as a result, the natural father ceased to work for the foster father. Finally on 23 June 1986, the foster parents applied to the High Court at Penang for an adoption order. The natural parents opposed the application and withheld consent. The learned judge granted the application. Hence this appeal.

The only issue in this case is whether the natural parents have withheld their consent to the adoption application *unreasonably*. The decision of the court, whether or not it should dispense with parental consent on the ground that it is being unreasonably withheld, must depend upon the facts of the individual case. The scheme of the Adoption Act 1952 ('the Act') is that no adoption order shall be made without the consent of the natural parents. There are, of course, exceptions. Section 5(1) of the Act provides:

> Save as hereinafter provided in this section, an adoption order shall not be made except with the consent of every person or body of persons who is a parent or guardian of the child in respect of whom the application is made or who is liable to contribute to the support of the child and an adoption order shall not be made upon the application of one or two spouses without the consent of the other of them:
>
> Provided that the Court may dispense with any consent required by this section if satisfied
>
> (a) in the case of a parent or guardian of the child, that he has abandoned, neglected or persistently ill-treated the child;
>
> (b) in the case of a person liable as aforesaid to contribute to the support of the child, that he has persistently neglected or refused so to contribute;
>
> (c) in any case, that the person whose consent is required cannot be found or is incapable of giving his consent or that his consent is unreasonably withheld; or
>
> (d) in any case, that in accordance with the provisions of any written law relating to the adoption of children for the time being in force in any country any competent authority has given permission or granted a licence authorizing the care and possession of the child to be transferred to the applicant.

Section 6(b) further provides:

> that the order if made will be for the welfare of the child, due consideration being for this purpose given to the wishes of the child, having regards to the age and understanding of the child;

The exception for consideration in this case is that provided by proviso (c) to s 5(1). The learned judge, quite rightly, considered all relevant facts, including:

(a) The ages of the foster parents and the natural parents, although we are inclined to think that the younger ages of the natural parents would place them in an advantageous position to be more actively engaged in bringing up the infant especially at play.

(b) The living conditions of the two parents. The foster parents lived in a rented old double-storey terrace house, part of which is used as an office for the foster parents' business. There are 11 occupants in the house and according to the welfare officer the house is quite congested. On the other hand the natural parents live in a flat which they purchased in 1981. Both houses have piped water and electricity.

(c) The income of the parents. The foster father has actually retired and has handed over the contracting business to his eldest son but continues to assist the son for $600 per month. The natural father earns about $600 to $700 per month. The natural mother is now a coffee shop assistant and earns $250 per month. There is really not much difference between the two as far as incomes are concerned.

(d) Love and affection. The infant is very attached to all members of the adoptive family, which is not surprising as the infant had been living with them since a tender age. The natural father too has shown love and affection by playing with the infant everyday when he was working for the foster father. The mother's love for her own child has never been questioned. The fact that they want the infant back is proof of their love for the infant. True, they gave their child away but that was because of their belief in the Chinese superstition. It seems to us that their greater natural love for their child has overcome their superstitution.

We are of the view that thus far, there are really no grounds why the foster parents should be preferred to the natural

parents from the point of view of the welfare of the infant. The learned judge, however, tilted the balance in favour of the foster parents in these respects and went on to rely on two specific grounds why he held that the natural parents withheld consent unreasonably.

The first is the de facto adoption as evidenced by the temple ceremony. The learned judge conceded that the natural parents had the right to change their minds but it is obvious from his evaluation of the evidence that the natural parents truly intended to give the infant away in adoption and should not now be permitted to change their minds. He made reference to s 8, which is a provision as to existing de facto adoptions, and said that if the infant had commenced his primary education, he would have had no hesitation in making an order for adoption by virtue thereof. We think s 8 has been misconceived in this instance. That section only applies to de facto adoptions *before* the commencement of the Act on 25 June 1953 and obviously does not apply here where the so-called de facto adoption only commenced on 11 November 1983. It will defeat the object of the legislature that all adoptions shall be in accordance with the Act if the courts were to recognize de facto adoptions as a ground for dispensing with parental consent.

Secondly, the learned judge held that:

> ... the disruptive effect on the body of transplanting him from his familiar surroundings where he has lived for nearly four and a half years to his natural parents, would be sufficiently permanent and serious to afford cogent reasons for holding that the consent of the natural parents to his adoption was being unreasonable withheld ...

He considered the reported cases where it was held that a year old baby would not be upset by such a change: *Re PA (An Infant)*[1] but a three year old would: *O'Connor* v *A and B*.[2] We would first observe that the natural parents asked for the return of the infant when he was two years old. The court had ordered an early hearing but the actual hearing did not take place until 28 April 1988. The delay is not the fault of the natural parents and we think they should not be disadvantaged because of this. In any event, in *O'Connor*'s case,[2] the reason for holding that withholding of consent was unreasonable was because the natural parents were not particularly stable individuals. Here the natural father did not lose touch with the infant. The natural mother visited him when he was in the welfare home by order of the court before the hearing and the infant was 'not frightened or felt uncomfortable with her'. We are of the view that a change of surroundings will not be disruptive in the instant case. After all, the infant is being taken back by his natural parents and is to be brought up together with his twin sister.

In all the circumstances of this case, we were of the view that the natural parents' withholding of consent is not unreasonable. We accordingly allowed the appeal with costs and set aside the order of the learned judge, and ordered the infant to be returned to the natural parents (the appellants) with access to the foster parents (the respondents) under the supervision of the welfare officer.

Appeal allowed.

Solicitors: *Yahaya & Teja; BT Lee & Co.*

Reported by *Prof Ahmad Ibrahim*

Tan Sri Haji Muhyuddin bin Haji Mohd Yassin & Anor v Dollah bin Haji Salleh

SUPREME COURT (KUALA LUMPUR) - CIVIL APPEAL NO 479 OF 1968
HASHIM YEOP A SANI CJ (MALAYA), HARUN HASHIM AND AJAIB SINGH SCJJ
11 OCTOBER 1989

Administrative Law - Declaration - Application for - Disciplinary proceedings by state football association against football player - Decision to impose ban on playing at national and state level - Whether ban imposed was ultra vires the constitution of state football association - Whether domestic remedies exhausted - Whether state football association had power to extend ban beyond territorial jurisdiction

Sports Law - State football association - Disciplinary proceedings - Imposition of ban - Territorial jurisdiction

The respondent was a football player playing for the Johore Football Association ('JFA') for the state of Johore from 1982 to 1987. JFA was also a member of the Football Association of Malaysia ('FAM'). By an order issued by JFA as a disciplinary action, a ban was imposed on the respondent from playing football at national or state level. The respondent appealed to the JFA. As a result, the ban was reduced in period effective from 18 July 1988 to 31 December 1988 and the respondent was only allowed to play for the national team, if selected, and for his new employer. It appeared that the FAM had sent a letter to urge member associations to abide by the ruling of the JFA. The respondent sought a declaration that the ban imposed was ultra vires the constitution of the JFA.

The learned trial judge granted the declaration and the appellants appealed. [See [1989] 1 MLJ 311.] It was argued on appeal that (a) that the respondent had not exhausted his domestic remedies as he had not appealed to the FAM; and (b) that in view of the letter from the FAM to all its member associations this case was distinguishable from *Haji Osman bin Haji Aroff & Anor* v *Abdul Karim bin Pin*.[1]

Held, dismissing the appeal:

(1) The respondent's basic allegation was the lack of jurisdiction on the part of the JFA to extend its order beyond the boundary of the state which was a defined area of its jurisdiction. It is in the discretion of the court to grant or not to grant the declaration. Under the circumstances, the respondent should not be denied access to the court even if he had not exhausted his domestic remedy.

(2) In this case, territorial jurisdiction is so fundamental that it will be a serious question for the JFA (as well as the FAM)